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SUKUMARAN RAMASAMY

v.

SELVA RANI RAMAN

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HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[ORIGINATING SUMMONS NO: 24-140-1998]
1 AUGUST 1998

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CIVIL PROCEDURE: *Contempt of court - Order of committal, application for - Breach of court order - Divorce case - Failure of defendant to deliver child to plaintiff as ordered by court - Whether defendant in contempt of court - Profuse apology by defendant for failing to do so - Whether defendant was purged of contempt - Love for child by both parties - Whether a redeeming feature*

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This was a divorce case wherein the plaintiff, had obtained an order of the court for access to the child of the marriage in question. The defendant failed to deliver the child as ordered. Hence, the instant application by the plaintiff to commit the defendant for failure to obey the said order.

*e***Held:***f*

[1] There was contempt by the defendant when she failed to deliver the said child to the plaintiff on the scheduled date. Order 52 of the Rules of the High Court 1980 governs committal proceedings.

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[2] The court will not hesitate to send to prison a person who deliberately takes the law into his own hands and defies an order of the court (*Mozley-Stark v. Mozley-Stark*). Where a person is so imprisoned he will only be released after he carries out the order in question (*Corcoran v. Corcoran*).

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[3] An apology is no acceptable substitute for compliance with an order and will not in any circumstances be regarded in itself as a purging of contempt (*Hadkinson v. Hadkinson*).

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[4] In the instant case, the defendant admitted that she had failed to comply with the order of this court and begged for mercy. In open court, the defendant unabashedly apologised. It was a profuse apology.

[5] No harm had been done to the said child. Both the parties dearly and truly loved their only daughter. This was the redeeming feature in the instant case. The defendant cried when she apologised to the court. The

defendant's counsel took the cue and she too cried, although not copiously. The said counsel could barely submit in that kind of charged and choked voice. It was an exhibition of emotional outburst.

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[Defendant cautioned and discharged.]

Cases referred to:

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Chung Onn v. Wee Tian Peng [1996] 5 MLJ 521 (*refd*)

Corcoran v. Corcoran [1950] 1 All ER 495 (*refd*)

Gordon v. Gordon [1946] 1 All ER 247 (*refd*)

Hadkinson v. Hadkinson [1952] 2 All ER 567 (*refd*)

Mozley-Stark v. Mozley-Stark [1910] P 190 (*refd*)

Segar Restu (M) Sdn Bhd v. Wong Kai Chuan & Anor [1993] 4 CLJ 177 (*refd*)

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Wee Choo Keong v. MBf Holdings Bhd & Anor and another appeal [1995] 3 MLJ 549 (*refd*)

Legislation referred to:

Rules of the High Court 1980, O. 52, O. 52 r. 1(1), (2), (3), (4)

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Other source referred to:

Imitation of Christ, Thomas A. Kempis

For the plaintiff - JBR Netto; M/s Nijar, Kumar, Netto & Partners

For the defendant - Komalam Vijayan; M/s Komalam & Co

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Reported by Usha Thiagarajah

JUDGMENT

Abdul Malik Ishak J:

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This was an application by the plaintiff to commit the defendant for failure to obey the order of this court dated 23 February 1998 which was served on the defendant on 24 February 1998. The plaintiff's *ex parte* application in encl. 10 was accompanied by a supporting affidavit in encl. 8 and the statement in encl. 9. The plaintiff obtained the *ex parte* order in encl. 6 dated 23 February 1998 on the following prayers:

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- (1) The plaintiff be given access to the said child from 11.00 a.m. every Saturday to 6.00 p.m. Sunday as well as on the said child's birthday on March 1, 1998 and for Deepavali of 1998.
- (2) The defendant to hand over the said child to the plaintiff at No: 12, Jalan Suria 4/2, Taman Suria, 81100 Johor Bahru when the defendant was served with the order.
- (3) This matter be set for hearing inter-partes on March 9, 1998 for a final order and the plaintiff is given custody, care or access and control of the said child.

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- a* (4) The defendant to pay the costs of this application.

At the inter-partes hearing on 9 March 1998, I varied the above orders on the following terms:

- b* (1) Access from 7.00 a.m. Saturday to 7.00 p.m. Sunday including the child's birthday and Deepavali for 1998.
- (2) No order as to costs.

c The defendant failed to deliver the said child to the plaintiff on 28 February 1998 nor on 1 March 1998 as ordered by this court. Hence, the present committal proceedings.

In her affidavit-in-reply that was affirmed on 16 April 1998 as reflected in encl. 18, the defendant deposed that:

- d* (a) The said child fell ill on 22 February 1998.
- (b) She was advised by the doctor to nurse and look after the said child for one week.
- (c) As a good mother, she followed the doctor's advise.
- e* (d) The doctor's letter dated 25 February 1998 was never given to her solicitors as she was hopeful of delivering the said child to the plaintiff in accordance with the court's order.
- (e) On 27 February 1998 the defendant's solicitors informed the plaintiff's solicitors that the said child will not be delivered on 28 February 1998
- f* to the plaintiff due to the child's sickness.
- (f) As the mother, the defendant was said to be the best person to look after the said child who was sick at the material time.
- (g) The said child was only delivered to the plaintiff on 7 March 1998 some
- g* 13 days later beginning from 22 February 1998.
- (h) That the plaintiff had abused the court's process in wrongfully using the provision for access against her in a vindictive and malicious manner so as to create problems for her and her family.
- h* (i) The defendant insisted that the plaintiff should not know her address and the delivery of the said child to the plaintiff was undertaken by members of the defendant's family.

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Both the parties were married to one another on 19 October 1994. There was bliss all round and this must surely be the love that blossoms between both parties. It is said that the heart that loves is always young. Thomas A. Kempis, in a book entitled "Imitation of Christ" said:

Love is swift, sincere, pious, pleasant, generous, strong, patient, faithful, prudent, long-suffering, manly, and never seeking her own; for wheresoever a man seeketh his own, there he falleth from love.

Dorothy Parker in "Unfortunate Coincidence" once said:

By the time you swear you're his
Shivering and sighing,
And he vows his passion is
Infinite, undying -
Lady make a note of this
One of you is lying.

Percy Bysshe Shelley, Prometheus Unbound in perfect language described love in this fashion:

All love is sweet.
Given or returned. Common as light
is love,
And its familiar voice wearies not
ever.

So sweet was love to the plaintiff that he initially rented premises at No: 2, Jalan Bukit Kempas 4/5, Taman Bukit Kempas, Johor Bahru for him to stay with his wife, the defendant. That was their matrimonial home until the plaintiff purchased a semi-detached house at No: 12, Jalan Suria 4/2, Taman Suria, Johor Bahru for a sum of RM950,000. As love blossoms further the said child, a daughter, was born on 1 March 1996 with a nice name to boot with: Hamssini A/P Sukumaran. It was their love child. The plaintiff works in Singapore as a general manager of Ngo Chiew Hong Edible Oil Pte Ltd earning a monthly salary of between S\$6,000 to S\$9,000 per month while the defendant is a school teacher in good old Johor Bahru earning approximately RM1,800 per month. It seems that on 26 June 1997 when the plaintiff returned from work at about 8 p.m. he discovered to his dismay that his wife, the defendant, had left the matrimonial home with their only daughter. Of course, the defendant also took away all her personal belongings. That was a blow to him. The plaintiff's predicament can be summed up in the words of Moliere, Tartuffe: "We are easily duped by those we love." The plaintiff was bewildered. No reasons were furnished for the sudden exit of the defendant and the said child. Later, by letter dated 29 August 1997 emanating from the

- a* defendant's solicitors Messrs Komalam & Co, the plaintiff came to know that "irreconcilable differences" were the reasons for the defendant leaving the plaintiff and the matrimonial home. The plaintiff swiftly appointed Messrs Nijar, Kumar, Netto & Partners as his solicitors who on 22 September 1997 replied to the defendant's solicitors' letter and requested for a divorce and
- b* reasonable access to the said child.

- While love was still warm, the plaintiff purchased a car and registered it in the name of the defendant. The plaintiff also went overboard and purchased an apartment known as Aster court and registered it in the name of the defendant. It was said that that apartment was priced at RM205,960. Such was
- c* the love of the plaintiff for the defendant then. But now love has turned sour. The plaintiff wants to commit the defendant for failure to comply with the order of this court.

- In my judgment, there was contempt by the defendant when she failed to deliver the said child to the plaintiff on the scheduled date. Order 52 of the Rules of the High Court 1980 ('RHC') governs committal proceedings. Order 52 r. 1(1) of the RHC states that the power of the High Court to punish for contempt of court may be exercised by an order of committal in Form 110. Order 52 r. 1(2) of the RHC is worded in this way (the relevant portion only):
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- e* (2) Where contempt of Court –
- (a) is committed in connection with –
- (i) any proceedings before the High Court;

- f* then, subject to paragraph (4), an order of committal may be made by the High Court.

Order 52 r. 1(3) and (4) of the RHC are worded in this way:

- g* (3) Where contempt of Court is committed in connection with any proceedings in the High Court, an order of committal may be made by a Judge of the High Court.

- (4) Where by virtue of any written law the High Court has power to punish or take steps for the punishment of any person charged with having done anything in relation to a court, tribunal or person which would, if it had been done in relation to the High Court, have been a contempt of that Court, an order of committal may be made by a Judge of the High Court.
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- The RHC empowers this court to punish the defendant for contempt. In *Mozley-Stark v. Mozley-Stark* [1910] p 190, the court there held that it would not hesitate to send to prison a person who deliberately takes the law into
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his own hands and defies an order of the court. It appears that on the authority of *Corcoran v. Corcoran* [1950] 1 All ER 495 where a person is so imprisoned he will only be released after he carries out the order in question. In *Wee Choo Keong v. MBf Holdings Bhd & Anor and another appeal* [1995] 3 MLJ 549 SC, Wan Adnan FCJ (now Chief Judge Malaya) had this to say of contempt generally (see p. 574 to p. 575 of the report):

But first, I like to say something on the standard of proof that is required to prove a charge in contempt of court proceedings. It is already well established that in contempt of court proceedings, proof must be proof beyond reasonable doubt, and that where there is a doubt the doubt ought to be resolved in favour of the person charged. In other words, the proof must be of the standard as is required in a criminal case.

In *Alligarh Municipal Board & Ors v. Ekka Tonga Mazdoor Union & Ors* AIR 1970 SC 1707, it was held:

In order to bring home a charge of contempt of court for disobeying orders of courts those who assert that the alleged contemnors had knowledge of the order must prove the fact beyond reasonable doubt ... In case of doubt, however, the benefit ought to go to the person charged.

In *Loot Ting Yee v. Tan Sri Sheikh Hussein bin Sheikh Mohamed & Ors* [1982] 1 MLJ 321, the applicant had applied to the High Court to commit the respondents for the alleged contempt of court. The application was dismissed in the High Court and in the Federal Court. The applicant then applied for leave to appeal to the Yang DiPertuan Agong.

Suffian LP on behalf of the Federal Court said:

With respect we are of the opinion that the learned trial judge's decision was in a criminal matter and therefore there is no right of appeal beyond the Federal Court.

In *Re Bramblevale Ltd* [1970] Ch 128, Lord Denning said:

A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt. It is not proved by showing that, when the man was asked about it, he told lies. There must be some further evidence to incriminate him.

The learned counsel for the second appellant (third defendant) had submitted that the injunction order dated 9 February 1993 ought not to have been issued by the court because:

- a** (1) a court would grant an injunction only to support a legal right (*Montgomery v. Montgomery* [1964] 2 All ER 22; [1964] 2 WLR 1036), and there was no legal right of the plaintiffs to be protected;
- (2) the injunction granted was too wide, and an injunction must be precise (*Garden Cottage Foods v. Milk Marketing Board* [1983] 2 ALL ER 770; [1983] 3 WLR 143); and
- b** (3) the injunction order was made without jurisdiction.

- c** In my view, these points are not relevant in contempt of court proceedings. They are relevant and may be valid in proceedings to set aside the injunction. In the instant case, the interim injunction order was made *ex parte*. Until and unless it is set aside, the order is valid and must be obeyed. In my view, the correct position is that once an interim injunction has been granted, it must be obeyed. If the person against whom the order is made feels that the injunction order ought not to have been made for any reason, he must apply to have it set aside. Until it is set aside, he must respect and obey it. (See
- d** *Wee Choo Keong v. MBf Holdings & Anor and another appeal* [1993] 2 MLJ 219).

In *Hadkinson v. Hadkinson* [1952] 2 All ER 567 particularly at p. 569, Romer LJ had this to say on obedience to an order of the court:

- e** It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. Lord Cottenham, L.C., said in *Chuck v. Cremer* [1846], 1 Coop. temp. Cott. 205; 47 E.R. 820;
- f** subsequent proceedings, 1 Coop. temp. Cott. 247, 338; 47 E.R. 841, 884; 16 Digest 89, 1120 (1 Coop. temp. Cott. 342):

- g** A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it ... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid - whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed.
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Then at p. 571 of the report, Romer LJ continued in serious vein:

- i** This attitude on the part of the mother sufficiently appears from para 10 of the affidavit which she swore in opposition to the summons and which is in the following terms:

I ask this honourable court to allow me to purge my contempt by this humble apology and believe that what I did was in ignorance and that I may be allowed to keep my son in Australia notwithstanding my contempt, as it is in the best interests of the child that he should be with me and enjoy a home and good education and the love and affection of one of his parents. My present husband has a real affection for my son which my son has in return for him.

a**b**

I would add in passing that an apology is no acceptable substitute for compliance with an order and will not in any circumstances be regarded in itself as a purging of contempt. Nor has the mother in any way, as I think, by virtue of any exception to the general rule or otherwise, shown that, notwithstanding her continuing contempt of court she should be allowed to be heard in support of this appeal, and by parity of reasoning she should not, in my opinion, have been heard in opposition to the father's application in the court below.

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It appears to me that this is the very kind of case in which the ordinary rule should be applied in all its strictness. Disregard of an order of the court is a matter of sufficient gravity, whatever the order may be. Where, however, the order relates to a child, the court is (or should be) adamant on its due observance: cf. the recent case of *Corcoran v. Corcoran* [1950] 1 All E.R. 495; 2nd Digest Supp. Such an order is made in the interests of the welfare of the child, and the court will not tolerate any interference with or disregard of its decisions on these matters. Least of all will the court permit disobedience of an order that a child shall not be removed outside its jurisdiction. The reason for this is obvious. The court cannot exercise its quasi-parental powers in relation to a child unless effect can be given to its orders and it cannot enforce its orders if the child is taken abroad. Once a child is removed from the jurisdiction no satisfactory means have ever been devised of ensuring or enforcing its return. It is because of this that applications for leave to take an infant even temporarily out of the country are jealously scrutinised and are only granted subject to every guarantee that is reasonably possible being exacted for the return of the child at the end of the authorised period. There is always the danger that a parent will be able, by wrongfully taking a child abroad, or by keeping him there after the sanctioned period has expired, to present the court with a fait accompli, and to argue that, the child having become firmly established outside the jurisdiction, it would be against his interests to bring him back within it. Indeed, an argument to this effect was foreshadowed during the discussion before us on the present appeal. It follows from what I have said that the mother's conduct in removing her son to Australia without the permission of the court and against its express order constituted, in my view, a contempt of the grossest kind.

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It must be emphasised that the wife in *Hadkinson v. Hadkinson*, *supra*, admitted the contempt complained of by the husband. The defendant in the present case also admitted that she had failed to comply with the order of

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- a* this court and begged for mercy. In open court, the defendant unabashedly apologised. It was a profuse apology. An order of this court should not be defied with impunity. This was also the view of Lord Greene MR in *Gordon v. Gordon* [1946] 1 All ER 247 especially at p. 254 of the report:
- b* There is, of course, another matter of great importance, and that is that the orders of the court should be observed and that no litigant should be permitted to say that he feels strongly that the order is a wrong order and, therefore, will not obey it. I do, however, derive some satisfaction from the fact that, as Lord Greene M.R., has pointed out, the difficulties which may arise under this rule may be removed as a result of this case. The importance of the present case is due to the fact that we are dealing with the custody of a small child.
- c* The hearing of this appeal has been expedited. It was expedited because we were dealing with the liberty of the subject. There was a stage when counsel for the appellant told us it would be unnecessary after all to ask that the appeal should be expedited because the respondent was willing, and her counsel agreed that she was willing, that the matter should stand over, because she had no desire to be vindictive and was not anxious that the appellant should be sent to prison. Upon that this court took a course which very likely we should not have taken if the matter in dispute had merely been the detention of a chattel. As Lord Greene, M.R. then said, expressing the view of the whole court, we did not think it proper to postpone the matter, because it did not rest with the parties to say whether mercy should be extended or not. It was not a question whether the respondent was vindictive or not. It was a question ultimately for the court whether it would be content that its orders should be defied with impunity. That I mention because it emphasises the public importance of the matter.
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- f* Just like *Gordon v. Gordon, supra*, no harm has been done to the said child. Both parties dearly and truly love their only daughter. This is the redeeming feature in the present case. No custodial sentence was imposed by Low Hop Bing J in *Chung Onn v. Wee Tian Peng* [1996] 5 MLJ 521 but his Lordship imposed a fine of RM7,000 or two months' imprisonment in default of payment thereof. I was more magnanimous in *Segar Restu (M) Sdn Bhd v. Wong Kai Chuan & Anor* [1993] 4 CLJ 177, when I cautioned and discharged the first defendant for being in contempt of court. The defendant here cried when she apologised to this court. The defendant's counsel took the cue and she too cried although not copiously. Of course, the defendant's counsel could barely submit in that kind of charged and choked voice. It was an exhibition of emotional outburst. In a choked voice she was barely audible. I listened attentively and, at the end of the day, I cautioned and discharged the defendant.
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